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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 111

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

JAMES F. MASTERSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Third Circuit entered on March 11, 1953.

OPINIONS BELOW

The first opinion of the United States District Court for the District of Delaware (R. 72-83) is reported in 101 F. Supp. 931, and its opinion upon rehearing (R. 83-85) is reported in 106 F. Supp. 687. The opinion of the Court of Appeals (R. 232-233) is reported in 202 F. 2d 638.

JURISDICTION

The decision of the Court of Appeals with respect to which the writ of certiorari is sought was entered on March 11, 1953 (R. 232-233). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, which is made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U.S.C. 79a *et seq.*

QUESTIONS PRESENTED

1. Whether the Commission, in determining fees for services rendered in reorganizations under Section 11 of the Public Utility Holding Company Act, must give conclusive weight to fee agreements between claimants and holding company clients unless those agreements are shown to be unconscionable?

2. Assuming that the Holding Company Act vested in the Commission responsibility for determining the amount of such fees within the area where there may be room for reasonable differences of judgment, does the Administrative Procedure Act permit a reviewing district court, in the guise of appraising the evidentiary significance of the "attorney-client relationship," to transfer the responsibility for judgment from the Commission to the regulated companies?

STATUTE INVOLVED

The following provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*) are pertinent:

Sec. 11. * * *

(d) The Commission may apply to a court,

in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any sub-

sidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of inves-

tors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

The following provision of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001) is also involved:

Sec. 10. * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted

by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

This case involves conflicting determinations by the Commission and the court below concerning the amount of an attorney's fee to be allowed in connection with a reorganization proceeding under Section 11(e) of the Public Utility Holding Company Act (15 U.S.C. 78k(e)). The plans proposed the settlement of intercompany claims and the liquidation of North American Light & Power Company ("Light & Power") to comply with an order of the Commission, dated December 31, 1941. A claim was asserted against Light & Power by its former subsidiary, Illinois Power Company ("Illinois Power"), for $26,000,000, and a claim was asserted by certain public preferred stockholders of Light & Power that any obligations to Illinois Power should be paid by Light & Power's parent, the North American Company ("North American"). Early in the proceeding, an appeal challenging the Commission's jurisdiction to hear the Illinois Power claims was dismissed on the ground that the order sought to be reviewed was interlocutory.[1]

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[1] *North American Light & Power Co.*, v. *SEC* (unreported) 2 SEC Jud. Dec. 1331 (C.A. 3, No. 8488, October 14, 1943).

After hearings before the Commission on the claims were completed, briefs and requested findings filed, and the matter scheduled for oral argument, a settlement was reached by the three companies and embodied in a plan. After amendment, this plan was approved by the Commission, and approved and enforced by the District Court. A subsequent plan dealing with other aspects of the liquidation of Light & Power was likewise approved by the Commission and thereafter approved and enforced by the District Court. On appeal, that order of the District Court was affirmed. See *In re North American Light & Power Co.*, 170 F. 2d 924 (1948). Further controversy and litigation determined the allocation of dividends which had been paid during the pendency of the appeal upon certain stock distributable under the plan.

The Commission had reserved jurisdiction over fees and expenses, and the plan which undertook to complete the liquidation, provided:

> Light & Power and North American will pay such fees and remuneration for services rendered and for proper costs as the Commission may approve including those incurred in connection with the matters involved in the settlement of the claims and counterclaims involving Illinois Power (but not including those incurred for the benefit of Illinois Power), and will also pay all other fees and expenses in connection with the liquidation of Light & Power.

After consummation of the plan, various applica-

tions for fees and expenses aggregating $3,064,-478.18 were filed with the Commission. The staff recommended that this amount be reduced to $2,-155,895.96.[2] The Commission, on December 21, 1950, issued a memorandum opinion and order "releasing jurisdiction" with respect to certain fees and expenses not disapproved aggregating $2,-270,650.00 in fees and $141,461.00 in expenses, including $22,590.47 for respondent Masterson which had already been paid (R. 57-60). Action was deferred upon further matters still in dispute, including the balance of Masterson's claim. That claim as well as other deferred claims was disallowed by order of the Commission dated May 7, 1951 (R. 65-68).

The Commission, by supplemental application to the District Court, requested that court to enforce its determination concerning the rejected portion of Masterson's claim and concerning one other rejected claim no longer in dispute. Masterson's objection was sustained by the District Court, which directed the Commission to allow his claim in full. The Commission appealed. The Court of Appeals affirmed the District Court by order dated March 11, 1953.

The services upon which the Masterson claim was based involved acting as junior and local counsel for Light and Power during the latter portion of the evidence-taking hearings before the Commis-

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[2] The applications of claimants other than respondent and the recommendation of the staff thereon are not a part of the record in this Court.

sion.[3] He was retained at a time when Illinois Power was nearing the completion of its affirmative case in support of its claims, and after representatives of the public preferred stockholders of Light and Power had urged that North American should be held accountable for any liability of Light and Power that might be established.

The major protagonists then, and throughout the proceeding, were: counsel for Illinois Power, counsel for public preferred stockholders of Light and Power, counsel representing North American, as the parent holding company and the residual security holder of Light and Power,[4] and the principal attorneys (Clayton E. Kline and his partners) for Light and Power. The substantial compensation awarded these principal counsel is not now in dispute.

Masterson's only tangible contribution to the proceeding as local counsel for Light and Power consisted of (1) arguing (unsuccessfully) in opposition to the motion to dismiss Light and Power's appeal to the Third Circuit from the Commission order authorizing the public preferred stockholders of Light and Power to assert a claim against North American to the extent that Illinois

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[3] See page 11, *infra*.

[4] In addition to the claims by public preferred stockholders of Light and Power on behalf of that company against North American based on the claims of Illinois Power against Light & Power, Illinois Power filed a claim against North American for any liability Light and Power might be unable to satisfy. Subsequently, it filed a direct claim against North American.

Besides its interest in the proceeding in this regard, North American, as the sole remaining stockholder of Light and Power, will receive all of its residual assets upon dissolution.

Power might establish its claim against Light and Power;[5] (2) being present at hearings where Kline was in active charge of Light and Power's interests and at which Kline conducted all of the examination of witnesses on behalf of Light and Power; (3) being present (personally or through an associate) as the sole representative of Light and Power at a number of hearings in which the primary conflict was between counsel for the public stockholders of Light and Power and counsel for North American, and where Masterson, on behalf of Light and Power itself, merely renewed from time to time a procedural objection previously made by Kline, *i.e.*, that to permit this particular line of inquiry would unduly encumber the proceeding. The insignificant contribution of Masterson to the formal record has been reproduced in full and occupies 128 pages (R. 87-196).

In support of his claim for compensation, Masterson relied (1) upon his professional experience as a trial lawyer, which did not include any prior experience in proceedings before the Commission or any substantial reorganization experience (R. 207, 219-220); (2) upon his usual per diem charge, said to be $250 per day (R. 206); (3) upon the number of days when he or his associate attended hearings, at some of which the actual hearings occupied less than an hour (R. 88-196, 213); (4) upon an estimate of days spent in office work and conference, which was made without benefit of actual time

[5] *North American Light and Power Co.* v. *SEC* (unreported) 2 SEC Jud. Dec. 1331 (C.A. 3, No. 8488, October 14, 1943).

sheets (R. 213); and (5) upon an agreement with the client, Light and Power, that a fee of $31,975 would "be mutually satisfactory" (R. 204). The agreement was entered into after the fee hearings but prior to the Commission's decision. The fee thus agreed upon amounted to approximately $150 for each "day" involved. The amount allowed by the Commission, $21,975, amounted to $100 for each such "day".

The Commission's reason for allowing Masterson compensation at a more moderate rate than it allowed to others who had taken a more prominent part in the proceedings was that it regarded his services as "basically unproductive" and "duplicative rather than contributory" (R. 56).

In its first opinion, the District Court cast doubt upon the authority of the Commission to supervise the allowance of fees and expenses to participants in Section 11(e) proceedings, and found that (R. 80-81): "Regardless of what effect should be given to the administrative fiat in the case at bar, or what power there may remain in a District Court under a § 11(e) proceeding to review fees and allowances made by the SEC * * * simple equitable doctrine requires that, after an examination of Masterson's services, the client be permitted to pay him what it thought and thinks is a reasonable and adequate fee of $150 [per day], and not the $100 *per diem* the Commission has announced is sufficient."

The Commission requested a rehearing for the purpose of briefing more fully than in its original application the matter of its fee jurisdiction.

After the rehearing, the District Court issued a second opinion which construed its first opinion as not holding that "the SEC has no jurisdiction whatsoever in setting the fees of counsel who appear before it in a § 11(e) proceeding" (R. 84). The holding as restated was that "under the facts of the case at bar, the SEC did not give full weight to an important factor in setting the lawyer's fee, *i.e.*, the lawyer-client relationship" (R. 84). The order of the District Court, entered on August 15, 1952 (R. 85-86), required the Commission to allow the full amount agreed to by Light and Power as the "client". The first opinion of the District Court deprecates the Commission's thought that "it had intimate knowledge of the 'duplicative' and 'secondary' character of the services"; stresses Masterson's normal per diem charge for court services, the agreement with the client, and the fact that "every party in interest, except the SEC, thought the rate was a reasonable attorney's fee" (R. 79-80), and concluded (R. 81) that it would be deplorable if "the management of a subject company is impotent to agree on lawyers' fees if it be against the pleasure of the SEC. The avowed paternalism of the Commission for security holders, under such circumstances, can have no arrival 'in accordance with legal standards' even under the thesis of the Engineers case." This reasoning was not modified by the opinion on rehearing which states (R. 84): "I do not think my opinion of December 3, 1951, should be changed."

After argument, the Third Circuit entered a

per curiam opinion (R. 232-233) in which it interpreted the District Court's holding as concluding that the Commission exercised its power over fees in a way that was not just and reasonable in awarding less than the amount agreed upon by Masterson and his client. It decided that "the District Court's action was a permissible exercise of its judgment in the performance of its reviewing function and that it should not be disturbed. Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951); *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951); *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 409, 410 (1952)."

REASONS FOR GRANTING THE WRIT

The decisions below, while assuming that the Holding Company Act gives the Commission some jurisdiction to pass on fees in connection with reorganizations under Section 11(e) of that Act, deny the Commission effective control over such fees to the extent agreed to by a holding company client. In respect of this important class of fees, the consequence is to frustrate the purpose of Congress to vest in the Commission primary responsibility for regulating such fees.

Within an area where there is wide room for reasonable differences of judgment, the Commission's holding is set aside without a determination that it is either arbitrary or in excess of statutory power, and the Commission is required upon remand to approve the precise amount

which the fee claimant and holding company management have agreed upon. The District Court rested its holding on the theory that the Holding Company Act did not sanction such "avowed paternalism of the Commission for security holders" (R. 81) as is involved in differing with management's judgment as to a fee where that judgment was not demonstrably unreasonable. The Court of Appeals held it a permissible exercise of the District Court's judgment to conclude that the Commission had "exercised its power over fees in the way that was not just and reasonable," in so far as the Commission had allowed respondent a fee less than that agreed to by the holding company client (R. 233). This appears to us to involve acceptance of the view of the District Court, and of respondents in the courts below, that the Commission in the exercise of its power to approve reorganization fees could not differ with management on the amount of the fee without finding such abuse on management's part as would have warranted interference by a court of equity in the case of an unregulated company. We believe that this involves a misconstruction of the Holding Company Act. If, as we urge, the Holding Company Act does confer upon the Commission the responsibility for reasonable judgment in this area, it is clear that the Administrative Procedure Act does not authorize reviewing courts to transfer that power to holding company managements. Whether the decisions below rest upon an interpretation of the Holding Company Act or of the

Administrative Procedure Act, a far-reaching issue is involved. The magnitude of this problem in relation to Holding Company Act reorganizations is indicated by the fact that there are presently pending before the Commission fee claims totaling approximately $8,000,000 [6] of which approximately $3,000.000 [7] represent claims of persons retained by the managements of the companies subject to regulation and approximately $5,000,000 represent fees of committees and their counsel and other representatives of public security holders. Five additional Holding Company Act fee cases are pending in the lower courts.

1. When consideration is given to the limited character of respondent's services as additional and local counsel for one of the companies involved in the reorganization and to the absence of any tangible contribution to the reorganization on his part, it is clear that no basis exists for a precise evaluation of the worth of his services. Thus, whether the sum of $21,975 allowed by the Commission or the larger sum of $31,975 agreed upon with the holding company client constitutes a just and reasonable fee is obviously a matter of judgment and policy. Had the fee award now in question been made initially by a district judge in the context of a bankruptcy reorganization under Chapter X of the Bankruptcy Act, we believe that there would be no conceivable basis for an appellate court requiring a district court to in-

[6] In addition, applications are pending for reimbursement of expenses totaling approximately $600,000.

[7] This figure includes a claim of approximately $200,000 by a top holding company.

crease the award in question. In that context, no agreement with the management of the company undergoing reorganization could have limited a district judge's discretion; indeed, the possibility of such an agreement being used even to influence his discretion has been precluded by the Borah Act which makes such agreements illegal in the bankruptcy reorganization field.[8] Nevertheless the holding of the District Court, which the Court of Appeals upheld, sets aside the Commission's award for failure to give "full weight" to the attorney-client relationship and directs the Commission, on remand, to accord the respondent precisely the amount agreed to by the holding company undergoing reorganization.

The District Court refrained from holding that "the SEC has no jurisdiction whatsoever in setting the fees of counsel who appear before it in a § 11(e) proceeding" (R. 84), and the Court of Appeals likewise assumed that the Commission has jurisdiction to approve such fees. However, the only

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[8] 50 Stat. 810, 28 U.S.C. 572a. This Act prohibits agreements in any receivership, bankruptcy or reorganization proceeding between parties in interest or their attorneys for the purpose of fixing the amount of fees. When Mr. Chandler of the House Committee on the Judiciary submitted his report on this bill to the House, he said the following with respect to it: "The bill is self-explanatory, its primary purpose being the prevention of private arrangements by parties or their counsel in receivership or bankruptcy proceedings as to fixing fees payable out of the assets of estates in litigation. Investigations have shown that the practice of permitting such agreements has resulted in the allowance of exorbitant fees, followed by the entry of consent decrees, thereby evading hearings of applications for allowances of compensation and determination thereon in open court after the admission of evidence to sustain every such allowance." (House Report No. 1524, 75th Cong., 1st Sess., August 13, 1937.)

room for Commission fee determination which the District Court opinion appears to recognize is that conceded by respondent below—namely, a power to protect the estate from being injured by a "fraudulent or unconscionable fee payment" with the burden on the Commission to prove its unconscionable character.[9] Since it would usually be impossible for the Commission to sustain such a burden in an area where there is as much room for reasonable differences of judgment as exists with respect to reorganization fees, the effect of the holdings below is to leave the Commission with nominal responsibility for such fees but without any real power to deal with them.[10]

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[9] In his brief before the District Court in reply to the Commission's petition for a rehearing, Masterson stated (pp. 2-3):

> We are willing to assume *arguendo* that, in the light of the Commission's authority to pass upon virtually all aspects of a plan of reorganization under Section 11(e)—subject, of course, to appropriate judicial review—the Commission also has some measure of jurisdiction to inquire into the matter of legal fees which are to be paid out of the assets of the Company undergoing reorganization, in order to ensure that the estate is not being mulcted and its assets drained away through fraudulent, unconscionable or extravagent payments to attorneys and others . . . we do not dispute that a power of surveillance does exist within proper limits.

Masterson took the same position in his brief before the Court of Appeals (p. 28):

> . . . we have been willing to assume *arguendo* that both the Commission and the enforcement court do have a measure of inherent supervisory power to protect the estate from being injured by fraudulent or unconscionable fee payments.

[10] In its brief in the court below, the Commission stated (p. 8):

> We do not argue that the company's agreement to pay Masterson $150 a day rather than the $100 a day which the Commission found his services to be worth was so

This is illustrated by *In re Northern States Power Co.* (unreported),[11] D. Minn., Civil Action No. 2673, January 12, 1953, after the opinion of the District Court herein (appeal pending). In that case, the court rejected the Commission's determinations with respect to the appropriate fee to be accorded to separate counsel who represented two of the holding companies involved. Without citing the prior decision of the District Court in the instant case, the *Northern States* opinion adopted similar reasoning to the effect that the Commission "has failed to give due weight to the contract arrangement between attorney and client." As a necessary consequence of the adoption of that rationale, the *Northern States* decision required the Commission on remand to accord precisely the fees and expenses which each of these counsel requested and which the holding company client approved.

The consequence of the denial of power to the Commission would be less serious if the District Court were undertaking itself to exercise a primary responsibility to curtail reorganization fees in the interest of investors, comparable to that exercised by a reorganization judge in Chapter X proceedings. The decisions below, however, do not involve the assumption of any such role by

improvident as to amount to waste, since the Commission made no such finding. Nor do we argue that an award of the larger amount ordered by the district court would be an abuse of discretion, if the district court were authorized by the statute to approve fees as such, rather than to exercise judicial review over the approval action of the Commission.

[11] Copies are being filed with this petition.

the District Court. Any such judicial undertaking would be impractical since, in its review capacity, a district court is concerned only with objections to what the Commission first decides. The objectors are usually dissatisfied fee claimants and only rarely those seeking to challenge fees allowed by the Commission.

In addition, a district court in a Section 11 case lacks that direct contact with the activities upon which fee claims are based which it acquires through the exercise of its primary jurisdiction to approve plans in a Chapter X proceeding. In the instant case, Masterson's activities before the District Court were limited to attending, without actively participating therein, the hearings on the applications for enforcement of the plan embodying the claims settlement and amended Plan I.[12] Thus, unless the Commission is to exercise an informed discretion to determine fees in Section 11(e) proceedings such as is exercised by other agencies or by courts with primary responsibility for plans of reorganization, there will be no effective regulation of fees in connection with Holding Company Act reorganizations.

2. Prior to the decisions below, the Commission's jurisdiction to approve reorganization fees

[12] The transcripts of the District Court plan enforcement hearings do not record any appearance by Masterson. (This transcript is not included in the printed record.) He testified that he "attended" the hearings, as well as preliminary conferences with the judge for the purpose of fixing hearing dates, and that he reviewed and made suggestions with respect to briefs prepared by Mr. Kline (R. 215-216). His schedule of services sought compensation for 4½ days in respect of court hearings (R. 202).

—*i.e.*, power to require claimants to justify their reasonableness—had been uniformly upheld in the courts and, indeed, its administrative determinations with respect thereto had been only occasionally challenged.[13] The source of that authority has been alternatively attributed to Section 11(e) and 11(f) of the Act. Section 11(e) itself does not mention fees, but the first sentence gives the Commission broad power "in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or con-

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[13] *Halsted* v. *S.E.C.*, 182 F. 2d 660 (C.A. D.C.), certiorari denied, 340 U.S. 834; *In re Electric Bond & Share Co.*, 80 F. Supp. 795 (S.D. N.Y.); and see *In re Electric Power & Light Corp.* (unreported), S.D. N.Y., Civil Action No. 49-347, December 23, 1952 (appeal pending); and see *In re Columbia Oil & Gasoline Corp.* (unreported), D. Del., Civil Action No. 288, May 18, 1945.

The following are instances in which the Commission has exercised jurisdiction over fees without challenge; *Derby Gas & Electric Corporation*, Holding Company Act Release No. 3236 (1942); *Great Lakes Utilities Company*, 11 S.E.C. 1134 (1942); *North Shore Gas Company*, 13 S.E.C. 139 (1943); *Utilities Employees Securities Company*, 17 S.E.C. 240 (1944); *Columbia Gas & Electric Corporation*, 17 S.E.C. 549 (1944); *The United Gas Improvement Company*, Holding Company Act Release No. 5570 (1945); *Engineers Public Service Company*, Holding Company Act Release No. 7041 (1946); *The Laclede Gas Light Company*, Holding Company Act Release No. 7260 (1947); *Electric Bond and Share Company*, Holding Company Act Release No. 7982 (1948); *Standard Gas and Electric Company*, Holding Company Act Release No. 8745 (1948); *New England Power Association*, Holding Company Act Release No. 8751 (1948); *The West Penn Electric Company*, Holding Company Act Release No. 9410 (1949); *Community Gas and Power Company*, Holding Company Act Release No. 9837 (1950); *The United Light and Railways Company*, Holding Company Act Release No. 10724 (1951); *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 11021 (1952).

sumers" to determine the conditions under which registered holding companies or their subsidiaries may submit plans.[14] The second sentence of Section 11(e) vests in the Commission initial responsibility for determining whether a plan is fair and equitable, and includes responsibility for fees in so far as that responsibility may be regarded as inherent in any determination as to fairness.[15] Section 11(f) expressly deals with fees, and expressly authorizes the Commission to require even in court proceedings "that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

In *In re Electric Bond and Share Company,* 80 F. Supp. 795, at p. 798, Judge Knox held that the Commission's "jurisdiction over fees is an inseparable part of the determination of whether a plan is fair and equitable." Other authorities have looked primarily to Section 11(f) as the source of that power. See *Halsted* v. *S.E.C.,* 182 F. 2d

[14] In the *Chenery* cases, the Court recognized the power of the Commission under this sentence, to deal broadly with all activities in relation to the reorganization. *S.E.C.* v. *Chenery Corp.,* 318 U.S. 80, 92-93, and 332 U.S. 194, 201-203. In this case, the plan as approved by the Commission made all fees subject to its approval, and since the Commission's practice of passing on reorganization fees of companies' counsel, as well as others, was established long prior to the services in question, there could exist no problem of retroactivity such as divided the court in the *Chenery* cases.

[15] *Cf. Brown* v. *Gerdes,* 321 U.S. 178; *Leiman* v. *Guttman,* 336 U.S. 1, 9.

660, 663 (C.A. D.C.), certiorari denied, 340 U.S. 834; *S.E.C.* v. *Cogan,* 201 F. 2d 78, 81 (C.A. 9). Irrespective of what might be the proper construction of either Section 11(e) or Section 11(f) if the other provision were not in the Act, the two together give the Commission complete jurisdiction to require that all fees in Section 11 proceedings be subject to its approval whether in respect of activities before the Commission or before the court. This result follows whether the express fee jurisdiction in Section 11(f) itself is construed as extending to all such fees, or merely as intended to make sure that the fee jurisdiction implicit in the Commission's power to deal broadly with the reorganization of holding companies, extends also to the fees of court-appointed trustees, and to fees for activities before the court—fees which might otherwise be subject to initial approval by the district court in the varying capacities mentioned in Section 11(f), *i.e.,* as a bankruptcy or receivership court or as a "court of equity" for purposes of subsections (d) or (e) of Section 11.

3. Once it is recognized that the Commission does have jurisdiction to approve fees in reorganization, there is no reason to assume that the Congress did not contemplate its exercising the broad judgment in this area which has been generally associated with the grant of primary jurisdiction to approve reorganization fees. *Cf. R.F.C.* v. *Bankers Trust Co.,* 318 U.S. 163, 170, dealing with the jurisdiction of the Interstate Commerce Commission to approve fees under the railroad reorgan-

ization provisions of the Bankruptcy Act. The fact that Congress intended the Commission to exercise such responsibility even with respect to the fees of court-appointed officers hardly justifies the concern of the district court lest holding company managements be "impotent" to agree to pay attorneys' reorganization fees which the Commission disapproves (R. 81). Indeed, the legislative background of the Act indicates that the Congress was greatly concerned with curbing the enormous amounts of patronage at the disposal of holding company managements, and particularly desirous that the extensive reorganizations which would be required under the Act, should not serve merely to give a fresh occasion for exploitation by the then greatly distrusted holding company managements.[16] Thus the Power Policy Committee referred to the desirability of protecting "the average investor from the exploitation threatening him almost as a matter of course under our usual methods and mores of corporate reorganization * * *. The dominant groups who have ruthlessly plucked the investors in promoting some of these huge holding companies must not be allowed to pluck him again as reorganization managers."[17]

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[16] It was recognized "that the concentration of control in the electric and gas industries through the device of the holding company has assumed tremendous proportions." This enormous control over other peoples' money was characterized as "private socialism" and wasteful as well as contrary to the public interest. See the report of the National Power Policy Committee on Public Utility Holding Companies appended to Senate Report No. 621, 74th Cong., 1st Sess., pp. 55-60.

[17] *Id.*, at p. 58.

The Senate Committee, in reporting out the bill, referred to it as giving the Commission "the complete supervisory power which is essential to the elimination of the present wasteful practices in corporate reorganizations." [18]

4. In holding that "the District Court's action was a permissible exercise of its judgment" which should not be disturbed, when it concluded that the Commission "exercised its power over fees in the way that was not just and reasonable," the Court of Appeals relied upon "*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951); *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U.S. 498 (1951); and *National Labor Relations Board* v. *American National Insurance Co.,* 343 U.S. 409, 410 (1952)" (R. 233). We can assume, arguendo, that the *Universal Camera* rule applies to the type of decision

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[18] Senate Report No. 621, at p. 33. The same report (at pp. 16-17) referred to the purpose of the bill as to obtain for holding company security holders—"not what is left [of dividends] after high salaries, large fees, bonuses to holding-company officers and bankers, and the purchase of securities at exorbitant prices from corporate insiders" but "all the legitimate cash dividends the operating company can pay." See also 79 Cong. Record 4607 (March 28, 1935), where Senator Wheeler stated:

> That brings me to the last point—the protection of the holding-company investor by the Securities and Exchange Commission. I do not blame the average investor for shuddering at the very word "reorganization". In the usual process of reorganization and regrouping of properties the investor might be given the same milking by reorganizing bankers and their lawyers that he has had to take in railroads, real estate, and every other kind of corporate reorganization. To meet that danger the bill puts the entire process of reorganization, including fees and so-called "reorganization plans", under the control of the Securities and Exchange Commission.

involved here. In this case, however, there was no real dispute before the Commission as to what respondent did. The problem was to value those services in relation to the evidence concerning the combined accomplishment in the reorganization, and of what others contributed to that accomplishment. The courts below did not even undertake to determine this value independently, but held merely that the Commission was not warranted in disregarding the bargain between the fee claimant and his holding company client.[19] That agreement, if evidence at all, was only evidence of private opinion upon the ultimate question which Congress directed the Commission to determine.

To sustain the action of the District Court, is to hold that the agency judgment may be set aside by a reviewing district court without interference on appeal, if there is evidence of a particular sort which conflicts with the agency holding, however reasonable or however otherwise substantially supported by the record as a whole.[20] In addition, it

[19] The gist of the District Court's holding, as stated in the memorandum on rehearing, "is simply, under the facts of the case at bar, the SEC did not give full weight to an important factor in setting the lawyer's fee, *i.e.*, the lawyer-client relationship" (R. 84).

[20] We are not clear from the opinion of the Court of Appeals whether it agreed with the District Court that the Commission was required to accept the combined opinions of respondent and his holding company client as to the appropriate fee or merely held that a determination to that effect by the District Court could not be disturbed on appeal. On either interpretation, however, the holding leaves no room for exercise by the Commission of the power to approve fees within the area where there may be room for reasonable differences of judgment, which we believe was vested in the Commission by the Holding Company Act.

disregards that part of the *Universal Camera* holding which reaffirms the traditional functions of agencies within their specialized fields including the right to choose "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." See 340 U.S. 474, 488. See the companion decision in *O'Leary* v. *Brown-Pacific-Maxon, Inc., et al.*, 340 U.S. 504, holding that the issue of whether a death arose out of and in the course of employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act was a question of fact for administrative determination because the relevant "standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law' " 340 U.S. at 507-508. These holdings leave undisturbed the prior decisions of this Court as to the respect to be paid to the exercise of administrative judgment within the areas in which Congress has delegated policy decisions to the agency. See *S.E.C.* v. *Central-Illinois Corp.*, 338 U.S. 96, 126-127. Unless, contrary to our view, the approach of the District Court is consistent with the proper interpretation of the Holding Company Act, it plainly cannot be supported by the provision in the Administrative Procedure Act that judicial review extend to "the whole record."

It was argued in the courts below that the matter of the worth of an attorney's fees is peculiarly

a matter of judicial rather than administrative expertise, that changes in Commission personnel between the time when the services were rendered and the fee award detracted from the Commission's ability to appraise the services involved in the instant case, and that the particular district judge was unusually experienced in cases involving Section 11(e) of the Holding Company Act. As to that respondents relied upon the holding of the Ninth Circuit in *S.E.C.* v. *Cogan,* 201 F. 2d 78, 86, which frankly emphasized the special expertise of judges with respect to matters relating to attorneys' conduct.[21] But we submit that the question is not to be resolved upon the basis of confidence, or lack of confidence, of the judiciary in administrative, rather than management, judgments with respect to attorneys' fees. As we have shown above, Congress concluded to rely upon an administrative judgment in this area, and, in so far as it thought that the administrative approach might differ from the judicial approach, was prompted by a hope that the Commission might be sparing in its fee allowances by comparison with prior judicial reorganization practice.

Moreover, if the allocation of responsibility between the Commission and the courts is to be

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[21] The Commission obtained an extension of time to consider whether it should file a petition for a writ of certiorari to review that decision in connection with the decision in the instant case. Despite disagreement with the reasoning of the Ninth Circuit, the Commission has concluded not to seek review of that decision in view of the possibility that the holding may be limited to a narrow question concerning the conduct of the individual attorney involved in that case.

based upon a comparative determination of abilities to evaluate reorganization fees, this Court has already observed, in *R.F.C.* v. *Bankers Trust Co.*, 318 U.S. 163, 170-171, that

> No question is made as to the competency of the Interstate Commerce Commission to appraise evidence and to draw an informed and intelligent conclusion as to what is a maximum reasonable compensation for services rendered. Indeed, since most of the services are performed in connection with its activities it is probably in a better position to judge of their value to the reorganization than any court or other fact finding instrumentality.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

JUNE 1953

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No. 111

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In the Matter of

NORTHERN STATES POWER COMPANY
(Delaware)

NORTHERN STATES POWER COMPANY
(Minnesota)

Civil No. 2673

ORDER

This proceeding relates to the allowance of fees and expenses in connection with the dissolution of the Northern States Power Company (Delaware) pursuant to Sections 11 (e) and 18 (f), Public Utilities Holding Company Act of 1935. After the consummation of the plan and the related proceedings affecting the Northern States Power Company (Minnesota), the direct subsidiary of the Delaware Company, all participants were requested to file their claims for fees and expenses with the Commission. The total amount requested aggregated approximately $850,000 for fees and $115,000 for expenses. Allowances to be paid by the estate were made between $490,000 and $495,000 for fees and some $103,000 for expenses. Six claimants filed objections challenging the findings of the Commission with respect to their allowances. They are as follows:

A. Louis Flynn, as counsel for the Delaware Company, requested fees of $135,000 in his original petition for services to December 31, 1948, and by a supplemental petition requests fees of $11,000 for services from the latter date to January 31, 1950, and from that date on, a claim for services rendered at the same rate as the services theretofore rendered. He claimed expenses in the sum of $9,725.53 to January 31, 1950. He was allowed a fee of $125,000 as compensation for all services rendered to January 31, 1950, and subsequent thereto, and allowed $9,725.53 for expenses to January 31, 1950, and for any expenses incurred thereafter in connection with the proceedings not to exceed $750.

G. Aaron Youngquist, as counsel for the Minnesota Company, filed a claim for $54,000 for services rendered and $2,338.70 for expenses incurred to January 31, 1950, plus an additional amount for services and expenses thereafter. The Commission allowed him $40,000 for all services rendered to January 31, 1950, and subsequent thereto, and authorized the payment of expenses incurred subsequent to January 31, 1950, in connection with the proceeding in an amount not to exceed $375.

Clarence McMillan, who appeared on behalf of two preferred stockholders and made a one-day appearance in connection with the proceeding, filed a claim for $15,000 for fees and expenses in the total sum of $16. His request for fees and reimbursement of expenses was denied.

Barron, Rice and Rockmore, appeared as attorneys for certain Class A common stockholders in the Delaware Company. They claimed a fee of $25,000 for their services and $1,240.77 for expenses. By a supplemental petition they claimed $243.35 additional for expenses. They were allowed $15,000 for fees and $1,240.77 for expenses. The supplemental petition for expenses was denied.

Sullivan and Worcester appeared as attorneys for a stockholder who held 1,100 shares of the Delaware Company Class A common stock. They requested a fee of $30,000 plus expenses. They were allowed a fee of $15,000 and reimbursement of the expenses incurred.

Standard Gas and Electric Company formerly held substantially all of the Class B common stock (729,083 shares of 729,166 shares) and 11,600 shares (3.4 per cent) of the Class A common stock of the Delaware Company. Two law firms and a securities analyst participated in these proceedings in its behalf. The Commission fixed the fees of counsel in the sum of $85,000 plus certain cash disbursements, but ordered that the allowance of the fees and certain of the expenses should not be paid by the Delaware Company, but should be paid by Standard itself. Neither Standard nor its counsel object to the amounts allowed, but challenge the finding of the Commission that the estate should bear no part of its legal services in this proceeding. Standard has paid the fees which were allowed and now seeks reimbursement in this proceeding.

The following appearances were made:

Mr. Myron S. Isaacs and Mr. Robert S. Keebler, of Washington, D.C., for the Securities and Exchange Commission;

Mr. A. Louis Flynn, of Chicago, Illinois, in his own behalf and also for Northern States Power Company (Delaware) and its subsidiaries;

Mr. G. Aaron Youngquist (of Messrs. Fowler, Youngquist, Furber, Taney and Johnson), of Minneapolis, Minnesota, in his own behalf with respect to his claim and also for Northern States Power Company (Minnesota);

Mr. Clarence McMillan, of New York City, in his own behalf;

Mr. Bernard S. Barron (of Messrs. Barron, Rice and Rockmore), of New York City, in his own behalf;

Mr. Robert B. Luick (of Messrs. Sullivan and Worcester), of Boston, Massachusetts, in his own behalf;

Mr. Paul D. Miller (of Messrs. Mudge, Stern, Williams and Tucker), of New York City, for Standard Gas and Electric Company.

This is a so-called Section 11 (e) proceeding and there is no specific provision therein which clothes the Commission with jurisdiction to determine and fix fees and expenses in such proceeding. But it seems reasonably clear that, with the right to determine whether the plan is fair and equitable, there necessarily must be the right to determine whether the fees and expenses incurred in the proceeding are fair and reasonable. Otherwise, an apparently fair and equitable plan, saddled with exorbitant or excessive fees or expenses, might be rendered entirely futile. Indeed, a depreciation of the assets of the reorganized company by excessive fees could well render the plan inequitable and unworkable. Moreover, the Commission's order of January 30, 1948, approving the plan expressly reserved jurisdiction with reference to the determination of fees and expenses to be paid by the estate, and the Court in its enforcement order provided,

> "(e) The Delaware Company shall pay or make provision for the payment of such fees and reimbursement of such expenses incurred in connection with the Plan, the transactions incident thereto, and the consummation thereof, as are approved, allocated, or awarded by order or orders of the Commission, and having made such payment or provision and having made the distributions and payments provided for in this paragraph (6), the Delaware Company shall transfer its remaining assets, if any, to the Minnesota Company, without consideration. In the event that the amount of such fees and disbursements approved, allocated, or awarded by such order or orders of the Commission shall exceed the amount of the cash of the Delaware Company available for the payment thereof, the Minnesota Company shall pay such excess."

Considerable support may be found for sustaining the Commission's jurisdiction to determine fees and expenses in an 11 (e) proceeding from the entire framework of the Public Utilities Holding Company Act, particularly Section 11 (f). See Halsted v. S.E.C., 182 F. 2d 660. But the basic jurisdicition of the Commission herein sufficiently appears from the purposes and objects of an 11 (e) proceeding.

Probably the more difficult question arises as to the scope of the jurisdiction of the Court in passing upon these objections to the findings of the Commission on the fees to be allowed. Concededly, the Court must recognize and give due weight to the experience and opportunity which the Commission has for fairly appraising applications for fees in such a proceeding. The Commission urges, and this Court recognizes, that where there is substantial evidence to support its findings, and if they were arrived at according to legal standards and are not so arbitrary and unreasonable so as to shock the conscience of the Court, then its decision as to fees should be approved. That the scope of the Court's jurisdiction in reviewing the Commission's findings in an 11 (e) proceeding is fairly narrow has recently been settled in S.E.C. v. Central-Illinois Corp., 338 U.S. 96, subject, however, to the caution as announced in Universal Camera Corp. v. Natl Labor Relations Board, 340 U.S. 474, 490, that all conventional judicial functions are not to be abdicated in reviewing orders of an administrative agency.

It may be noted that, before applications for allowance of fees and expenses were lodged with the Commission, the Public Utilities Division

suggested to the Delaware and Minnesota companies that they endeavor to reach agreements with the various claimants as to the amount of fees and expenses and then make a recommendation to the Commission as to the amount of fees and expenses which should be allowed. This was done. The claimants, or at least many of them, conferred with the companies, and after due investigation by the companies, a complete report covering some 85 pages, and with a detailed review of the claimants' services and the companies' recommendation, was submitted to the Commission.

The several objections will be considered in the order referred to above.

A. Louis Flynn

Mr. Flynn acted as attorney for the Delaware Company and its subsidiaries throughout this proceeding. His showing indicates that up to January 31, 1950, his office devoted some 6,128 hours to the proceeding, and of that number some 4,739 hours represented his personal time. In justifying its treatment of his claim, the Commission found that an appreciable part of the time spent and services rendered by him was ineffectual in conferring upon the estate or the security holders any benefit. Among other matters, it refers to his alleged unsuccessful efforts in opposing the application for a list of preferred stockholders to the Preferred Stockholders Committee, his unsuccessful opposition to the entry of an order under Section 11 (b) (2) of the Act before the Commission and on appeal, his alleged opposition to "certain accounting adjustments", his opposition to the reopening of the record to reconsider the first amended plan, and the alleged duplication of services as between him and Mr. Youngquist, attorney for the Minnesota Company.

At the outset, it must be noted that all of Mr. Flynn's services were performed as counsel for the Delaware Company and that that which he did as counsel apparently carried out the views and policies of his clients. He was not a volunteer in this proceeding, whose services should be strictly appraised by the contributions made to the formation, development and consummation of the plan. Both the Delaware Company and the Minnesota Company recognize that the services related in Mr. Flynn's claim were performed at the request of the respective companies. If some of the services rendered were, in the view of the Commission, unsuccessful steps taken with respect to certain issues raised in the proceeding, Mr. Flynn was nevertheless performing such services at the instance of his clients. Both companies have filed statements in which they approve his fee application. There is no contention or showing by the Commission that the amount claimed by Mr. Flynn is unreasonable in view of the legal services which he actually performed. There is no testimony which contradicts or questions the number of hours devoted to the proceeding or the reasonableness of the hourly rate requested by him. His skill and experience are not controverted. Concededly, the questions involved in this proceeding and affecting these companies were intricate, novel, and required high legal skill. It is not surprising, therefore, that the companies' views and policies in carrying out the apparent purposes and objects of the proceedings did not conform at all times to the Commission's views. To attempt to effect compliance with the Act necessarily presented difficult problems. Whether all of the companies' decisions, therefore, proved to be ultimately right or wrong, they were entitled to legal assistance and advice in doing that which they

determined to be compatible and in furtherance of the objects of the proceeding. If legal counsel engaged by these companies, and in carrying out their wishes, are to have their legal fees subjected to the arbitrary rule that, unless the services rendered are ultimately proved to be in furtherance of the policies and plan finally approved by the Commission and the Court they will be disallowed, it would be hazardous indeed for any counsel to accept employment under such circumstances. There is no contention by the Commission that the fees, if allowed as requested and approved by the companies, will affect in any way the fairness or equitableness of the plan, or that the payment will impose any unreasonable financial burden upon either the companies or their security holders. In the findings and opinion of the Commission, the following comment appears anent Flynn's claim,

> "Flynn acted as counsel to the Delaware Company and its subsidiaries throughout the proceedings, advising management with respect to all legal problems, drafting and presenting the various plans filed by the Delaware Company and taking a major part in all matters connected with the evaluation and presentation of such plans and the consummation of the plan finally approved. * * *
>
> "From the commencement of the proceedings Flynn was charged with complete direction and supervision of all legal matters for the Delaware Company. During a substantial part of the proceedings he also acted on behalf of the Minnesota Company. * * *
>
> "Although we recognize, as Flynn has stated, that his opposition at various stages of the proceedings reflected the views of the management, in determining what allowance should be awarded him in these proceedings, consideration must be given to the fact that his activities included unsuccessful opposition to such appropriate steps as the making of the accounting entries and the furnishing of the stockholders' list. While Flynn's services contributed to the formulation, development and consummation of the Section 11 (e) plan, his activities were devoted in large measure to supporting plans which proved unsatisfactory, and as a result the laboring oar in carrying through the plan as finally consummated passed from company counsel to various counsel for the common stockholders of the Delaware Company. Such counsel performed considerable services which might otherwise have been performed by company counsel and for which, as we note below, substantial compensation is properly allowable out of the reorganization estate."

Although it may be true that some of Mr. Flynn's services were performed in the furtherance of plans and policies which the Commission did not support, and this led to greater activity on the part of counsel for the common stockholders, no one questions the good faith of Mr. Flynn in performing the services which his clients authorized him to perform. Under such circumstances, it would be an anomalous situation if sanction were not given to the contract between the parties. The Commission apparently recognized that in determining the amount of compensation to be paid to counsel for the company which is subject to the 11 (e) proceeding, "the services rendered by such counsel for that purpose need not be measured by the results obtained where their proposals are reasonable." If that is the criterion to be applied -- the reasonableness of

the proposals made -- in evaluating Mr. Flynn's services and in determining whether his claim should be approved, the record does not sustain the Commission in its conclusion that his fee should be cut some $21,000 for services rendered to January 31, 1950, and that no allowance should be made for services rendered thereafter. At best, the Commission's action is an arbitrary reduction which it determines at this time based upon its conclusion that, in the retrospect, it appears that some of the efforts of counsel in behalf of its client were not reasonable. Under such circumstances, there is always the tendency to substitute hindsight for foresight.

In a long and involved proceeding of this kind, there is bound to be duplication of some of the services rendered, and some tactical moves which at the time seemed reasonable and for the best interest of the companies involved now may seem ill-advised in light of the events that have taken place. It may not be amiss to point out that the Commission itself spent a great deal of time and effort on the first amended plan, and later it was required to confess that it erred in its approval. Moreover, it seems quite evident in reading the Commission's opinion that it proceeded to evaluate Mr. Flynn's services substantially in the same way as it would evaluate the services of a volunteer who necessarily must have his remuneration limited to the actual contribution that he made to the formulation and consummation of the plan of reorganization. It seems to the Court that, if one accords due weight to the contract arrangements between attorney and client and recognizes the approval and ratification by the client of the services rendered and gives due weight to the amount of time expended by this applicant and the experience and skill of counsel, the allowance accorded to him by the Commission should not be sustained. The Court is fully cognizant of the weight which generally should be given to the Commission's findings where the appraisal of the value of the attorneys' fees is involved in a reorganization proceeding, and the Court also recognizes that there may be instances where the contract arrangement between the company in reorganization and its attorney should yield to the exigencies of the reorganization which must meet the standards of being fair and equitable. But that situation does not exist here. If the Delaware Company has insufficient funds to pay Mr. Flynn's claim, the Minnesota Company stands ready, willing and able to pay the deficiency. The Court determines herein that, in light of this record, the Commission has failed to give due weight to the contract arrangement between attorney and client and to all the attendant circumstances, and I conclude that the findings of the Commission with respect to Mr. Flynn's fees were not arrived at in accordance with appropriate legal standards. It follows, therefore, that Mr. Flynn should be accorded the fees and expenses which he requests and which his clients have approved.

G. Aaron Youngquist

Mr. Youngquist, as a member of the firm of Messrs. Fowler, Youngquist, Furber, Taney and Johnson, acted as general counsel for the Minnesota Company throughout these entire proceedings. He asks no payment from the Delaware Company. Any remuneration which he receives for legal services will be solely from his client, the Minnesota Company, for which he was acting in attempting to protect its interests and rights so far as they might be affected by the liquidation of the Delaware Company. The services which he performed were at the request of his client. The Minnesota Company, and the Delaware Company

as well, are satisfied with Mr. Youngquist's bill and have approved his fees and expenses as requested. That which the Court has stated with respect to Mr. Flynn's claim is particularly apposite here. All of Mr. Youngquist's services were rendered in connection with this proceeding. There is no showing that that which he did was not performed at the behest of his client in good-faith efforts to safeguard and protect its interests in this liquidation and dissolution. The fact that Mr. Youngquist and Mr. Flynn collaborated and that there may be some duplication of effort does not, on this record and in view of the contract relation between Mr. Youngquist and the Minnesota Company, militate against the reasonableness of the compensation to be allowed him. The Minnesota Company is satisfied that any duplication should not deprive him of the fee requested, and the fact that Mr. Youngquist and his client may have differed with the Commission or the Court with respect to many of the complex issues and questions involved should not affect his right to reasonable compensation. No one questions the reasonableness of the fees for the services actually performed, and obviously they cannot be characterized as being so unreasonable that good conscience requires their denial. As observed in connection with the Flynn claim, the mere fact that certain proposals advanced by the Minnesota Company were not adopted or may not seem reasonable now, should not deprive counsel of compensation for services rendered at the request of his client. For aught we know now, the so-called advance earnings estimate proposed by Mr. Youngquist for his client, as well as other proposals made by them, may prove to be more sound in the future than that which was adopted by the Commission and approved by the Court. There is not the slightest showing or contention that the payment of Mr. Youngquist's bill will affect in the remotest degree the fairness or equitableness of the plan of reorganization involved herein. The Commission has failed to give due weight to the contract relation between attorney and client, and in view of all the attendant circumstances, its findings and conclusions with respect to Mr. Youngquist's claim cannot be sustained as complying with appropriate legal standards and is not a fair and equitable disposition of this claim. The Court finds that the fees and expenses as requested and approved by the client should be allowed.

Clarence McMillan

As stated, Mr. McMillan represented two preferred stockholders who owned 250 shares of the preferred stock of the Delaware Company. He appeared at the initial hearing on July 8, 1942, and advanced the theory that sound principles in reorganizations under the Bankruptcy Act required that allocations be made on asset value rather than prospective earnings. His oral appearance was very brief and he filed a four-page memorandum to support his views. He never appeared again, nor did he participate in any way thereafter in the hearings or proceedings; in fact, his next appearance was at the fee hearing some seven and one-half years later. He requests a fee of $15,000 and $16 by way of expenses. The Commission found,

> "We have carefully reviewed the services of this claimant and have concluded that no contribution resulted from his limited participation. We cannot find that under the circumstances either his suggestion that the distribution to the preferred stockholders should be based on asset values, or his mere assertion that the plan should provide for payment

of accrued dividends out of cash or in the form of additional Minnesota Company stock if cash was not available, was of a nature to constitute a compensable benefit to the estate. The former was without merit and the latter was not substantially different from assertions made to this Commission by a number of other preferred stockholders."

In these views of the Commission, the Court on this record is in complete accord. The objections are overruled and the claim is denied.

Barron, Rice and Rockmore

This firm represented some 70 stockholders owning 24,750 shares of Delaware Class A common stock. Their showing in support of their claim for fees indicates that a total of 1,590 hours were devoted to these proceedings, and of that time, 1,380 hours represented time spent by Bernard S. Barron, a senior member of that firm. The fee requested was $37,500. At the request of the Public Utilities Division of the Commission, the company conferred with various counsel who had filed claims for fees and expenses in order to see whether an agreement could be reached as to the amounts to be paid to the various fee claimants. Mr. Barron of this firm complied with this request and made a trip to Minneapolis from New York for that purpose. He presented his claim in person to the representatives of the companies, and after a hearing, they filed a detailed report and recommended a fee of $25,000, which Mr. Barron agreed to accept. The Commission, however, in passing upon this claim, reduced it to $15,000, stating, in part,

"The Barron firm filed objections to the enforcement of the First Amended Plan with the District Court, contending that the foreseeable earnings of the Minnesota Company were approximately $8,215,000 rather than $6,500,000 as had been estimated by us. 14/ Barron together with other counsel supported the Commission's application for a continuance of the enforcement proceedings, and thereafter participated in all the hearings before us and the court, cross-examined witnesses, filed memoranda and briefs, participated in oral argument, and proposed a modification of the Biewend-Johnson Plan, which was one of the alternative plans submitted after the hearings were reconvened. He opposed the Second Amended Plan filed by the Delaware Company but subsequently supported our application for enforcement of the Second Amended Plan, as modified. The record indicates that the services of the Barron firm contributed to the proceedings and the development of the plan as finally approved and to the increased allocation for the Class A stockholders.

"Under all the circumstances, including the duplication of effort referred to above, we think that a fee of $15,000 is reasonable compensation for the services rendered and the contribution made by this claimant.

"14/ The Barron firm joined with the Delaware Company in opposing the application of the Foster Committee for authority to solicit authorizations from the preferred stockholders."

The Commission also pointed out that there were at least three groups of attorneys for Delaware Class A common stockholders who were allowed an aggregate fee of some $170,000. $140,000 went to the firms representing the so-called Lehman group. Apparently the attorneys for this latter group assumed the laboring oar after Mr. Barron's firm had taken the initiative for the Class A common stockholders in objecting to the approval of the first amended plan. Everyone recognizes that the attorneys for the Lehman group made the most effective and constructive contribution to the formulation and ultimate adoption of the final plan. But, notwithstanding, the record will not justify such a substantial cut in Mr. Barron's claim which the Commission has made upon the basis of duplicitous services. The duplicitous services referred to pertain to the several groups who were representing Class A common stockholders and which were all motivated in obtaining the most favorable allocations for this group. Undoubtedly there was some duplication, which is inevitable in a proceeding of this kind, and the mere fact that duplication exists does not justify such a substantial reduction as was accorded the Barron firm. Moreover, it appears that, when the attorneys for the Lehman group did assume the major task of representing the Class A stockholders, the Barron firm voluntarily reduced its participation in the proceeding accordingly. The relegation of the Barron group to $9.43 an hour is not fairly justified by the record. The Lehman group were accorded an allowance of $24.48 an hour. The disparity between the compensation allowed Mr. Barron and other counsel for Class A stockholders is not consonant with fair and equitable consideration and does not find sufficient support in the record to justify the approval of the Court. True, there is bound to be disparity in the hourly rates accorded to various fee applicants, and the mere existence of such disparity is not sufficient ground for finding that the one accorded a less hourly rate has been treated unfairly. Many other factors must be considered. Attorneys in such proceedings as volunteers may put in a large number of hours but the ultimate contribution to the results may be relatively unsubstantial and their allowances must be appraised accordingly. But, in light of this record, the Court is constrained to find that the contribution of the Barron firm cannot in good conscience be approved at $9.43 per hour. Recognizing the weight that should be accorded to the findings of the Commission by reason of its association with these proceedings, nevertheless it should be remembered that this Court by reason of the lengthy hearings on the enforcement of the plan, is also acquainted with such of its background and history and cannot entirely abdicate its prerogatives in reviewing much fee allowances and must determine whether or not the findings of the Commission are consonant, in light of fairness and equity, with the legal standards which should be applied. It is my view that a fee of $23,850 should be allowed this firm for the services performed and the contribution which it has made to these proceedings. This sum is less than the amount approved by the companies and in light of all the circumstances should accord this claimant fair and equitable compensation. It follows, therefore, that the fee of this firm is fixed in the sum of $23,850.

There is, in addition, the expense item of $243.35, which was allegedly incurred by Mr. Barron in making a trip to Minneapolis at the request of the Commission in order to determine whether the company and this claimant could agree upon the reasonableness of the fees to be paid. It would seem that such expenses were incurred for the purpose of contributing to and aiding the

Commission in its problem in passing on the matter of fees. Such expenses should be distinguished from the ordinary expenses which a claimant incurs of his own volition in presenting his claim to the Commission or to the Court for fees and expenses. Here, we have a situation where the expenses which were incurred arose by reason of the request of the Commission, and in carrying out one of the processes adopted by the Commission in the fulfillment of its duty in an 11 (e) proceeding. These expenses should be allowed, and it is so ordered.

Sullivan and Worcester

This firm represented Cameron Biewend, who held 1,100 shares of Delaware Class A common stock, and its services began as counsel in February, 1946. The Commission points out that it "thereafter participated actively both before us and the court." Its application for fees indicates that some 1,496 hours were devoted to these proceedings. Fees in the sum of $30,000 were requested. The companies, however, after investigation, recommended a fee of $22,500. The Commission allowed a fee in the sum of $15,000. In passing upon the fees to be allowed this firm, the Commission found that

> "Shortly after it was retained by Biewend, Sullivan & Worcester filed with the District Court a statement of objections to the enforcement of the First Amended Plan and filed with us a motion to reconvene hearings to receive new evidence. Biewend, a security analyst, began formulating an alternative plan, and, after the Lehman Plan was submitted to us, he communicated with Christian A. Johnson, who was also interested in the proceedings because of his ownership of Standard's $4 preferred stock, and together they formulated and submitted a plan known as the Biewend-Johnson Plan. At the reconvened hearings both testified in support of this plan and by their testimony attempted to show that the Minnesota Company's annual foreseeable earnings would exceed $8,000,000. This testimony was contributing factor in inducing us to vacate our order approving the First Amended Plan.
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> "Sullivan & Worcester, as Biewend's attorney, rendered efficient and able service. They presented direct evidence through the testimony of Biewend and Johnson, cross-examined other witnesses, filed briefs and presented oral argument. They were partially responsible for the reopening of the proceedings, the rescission of our order approving the First Amended Plan and for securing a more favorable allocation for the Class A stockholders.
>
> "Under all the circumstances, including the duplication factor referred to above which is also applicable to the services of this claimant, we are of the opinion that a fee of $15,000 will adequately compensate these attorneys for their services."

The only factor mentioned by the Commission as motivating it in reducing this fee to $15,000 was the "duplication" factor. Undoubtedly as indicated heretofore, the duplication factor is an important circumstance in determining the fees to be allowed when there are several different firms of attorneys representing various holders of the same class of security. But, as indicated

heretofore, the duplication in a proceeding of this kind is inevitable and is not necessarily an unmixed evil. It may be doubted that the Commission would have reversed itself on the first amended plan had it not been for the rather persistent and active representation and opposition of the various security holders holding the Class A common stock. Allowances in a proceeding of this kind must meet the standard of just compensation so that attorneys will be willing to participate actively and render a valuable contribution to such a proceeding and await the consummation of the plan before any remuneration is obtained. As to the present applicants, nearly seven years will have elapsed before they have obtained the final payment on the allowance which is to be made to them. Granted that it is difficult to determine just what reduction should be made where there is the duplication factor, and granted also that reasonable minds may well differ as to this problem, nevertheless, the reduction here seems too drastic in light of all the circumstances and does not square with the Court's understanding of just and equitable compensation. The hourly rate which the Commission allowed is upon the basis of about $10 per hour. The observations made by the Court anent the claim of Messrs. Barron, Rice and Rockmore are pertinent here as to the reasons which persuaded the Court in modifying the Commission's finding as to the allowance to be made. My view is that an allowance in the sum of $20,000 is fair and reasonable and the fees of this firm are fixed in that sum.

The only other phase of the objection made by this firm which requires any particular comment pertains to the item of $3,800 which this firm received from Biewend, and which amount the estate reimbursed Biewend by requiring a refund to him from interim fees paid to this firm. In effect, therefore, the $3,800 received by counsel from Biewend was money from the estate, and in order to make up the $15,000 allowed by the Commission's order of April 8, 1952, a $12,500 interim payment having been made, the net amount to this firm in the Commission's amended order of May 15, 1952, was the sum of $2,500. Counsel contend that the Commission erred in requiring them to repay Biewend the $3,800 which he had advanced in three sums: $1,000 in 1946; $1,800 in 1947; and $1,000 in 1948. They contend that they credited these sums to him as a retainer and reflected these sums in their income tax statements for these years. But these moneys were correctly noted in their income tax statements as fees. The mere fact that Biewend may have made a notation in his claim that he advanced these moneys as expenses to the attorneys is not controlling, and as a matter of bookkeeping, the fees received by this firm which the estate paid, or will pay, according to the Commission's findings, are as follows:

$1,000	in 1946 (from Biewend)
1,800	in 1947 (from Biewend)
1,000	in 1948 (from Biewend)
8,700	in 1950 ($12,500 was paid to Sullivan & Worcester but $3,800 was ordered to be refunded to Biewend)
2,500	by order of the Commission of April 8, 1952, as modified May 15, 1952
$15,000	

If it is clearly borne in mind that the fees of this firm received in 1946, 1947 and 1948 from Biewend are moneys which ultimately came out of the estate by reason of the refund to Biewend of such sums, then there should be no confusion in recognizing that the Commission's order with respect to the refund to Biewend in the sum of $3,800 must be approved. It follows from the foregoing that the balance due Sullivan and Worcester for legal services rendered in this proceeding is $7,500.

Standard Gas and Electric Company

Two law firms and a security analyst participated actively in these proceedings in behalf of the Standard Gas and Electric Company. The Commission found that these claimants rendered valuable services and that the amount of $40,000 requested by attorneys Miller, Mack and Fairchild was reasonable and that the payment for the legal services to Guggenheimer and Untermyer should be limited likewise to $40,000, plus reimbursement of their expenses. However, as stated, it was further ordered that these sums should not be paid by the Delaware Company but by Standard itself. It now appears that Standard has paid these sums to the claimants and seeks reimbursement of the amount paid. Primarily the determination of the Commission that Standard should pay the fees for its own counsel was bottomed upon the following premises.

> "We think that the claims in question should be satisfied by Standard without any contribution by the Delaware Company. The Act was enacted to rectify various abuses and uneconomic situations resulting from the use of the holding company device in the public utility field. Holding companies were charged with a statutory duty of bringing their systems into compliance with the standards of the Act and we believe that they should bear their own costs incurred in connection with system proceedings for effecting such compliance rather than shift such costs to the subsidiaries. In the present case Standard, though its position as a holding company over the Delaware Company ceased in 1941, was the parent of the Delaware Company when the complexities were created which we found were required to be eliminated under the Act and which the plan was designed to eliminate. Standard was responsible for those complexities and thus for the necessity of these proceedings. Equity demands that its fees and those of counsel representing it or its stockholders should be borne by it alone, and not by the Delaware Company."

In addition, however, it is urged that the Commission's order should be sustained because although Standard held two classes of stock whose interests were adverse, its primary concern was with the share which should be allocated to the holders of Class B stock in the reorganization. Its activities, therefore, were principally directed to the benefit of that class of stock. Its position in this regard was not unlike that of a large unsecured creditor seeking recognition for its claim in a bankruptcy reorganization. Its activity in the reorganization was directed to the benefit of its own claim and any benefit which inured to the estate or any class of creditors was merely incidental to its principal purpose. Standard was itself the class which was benefited by its contribution to the plan. Its activities so far as being compensable in this proceeding must be distinguished from the activities of counsel in behalf of a certain group of security holders and whose activities benefit this

entire class and contribute to the plan. The very necessities of such a situation suggest the fairness and equity of having the estate burdened with such expense rather than to impose it upon the small and many individual security holders. Here, however, the benefits which Standard itself received from its efforts strongly suggest that any legal expense in connection therewith should be borne by it.

In response to the Commission's contention that Standard was responsible for the complexities which brought about the proceedings under 11 (e) of the Holding Act, Standard urges that during the years that it was the parent of the Delaware Company, such relationship was in no way in violation of the law, and the Commission's action in "penalizing" it for its past activities is in effect imposing an ex post facto penalty on Standard. However, the Court does not find that it is necessary to refer to the many alleged abuses of Standard, which, according to the Commission, milked the Northern States system during the time that Standard was in control. The undeniable fact is that, as a result of this reorganization, Standard emerged therefrom as the largest stockholder of the Minnesota Company. It is elementary that a successful litigant should pay its own counsel.

Standard contends that the Commission's position is inconsistent in that it did authorize the reimbursement to Standard of its advancement to the expense of the Stone & Webster report. But such action by the Commission in authorizing the reimbursement of moneys paid out for the benefit of the estate in no way commits it to the allowance of Standard's attorneys' fees. If there was inconsistency, it redounded to Standard's benefit and it cannot complain.

In light of all the circumstances and in view of the prior relationship between Standard and the Delaware Company, this Court has no doubt that the Commission acted in accordance with sound, equitable principles and legal standards in requiring Standard to pay its own counsel. The objections of Standard are overruled and the Commission's action with respect to its claim for reimbursement is in all things sustained.

An order consistent with the foregoing may be presented, and for the convenience of the parties it is suggested that Mr. Youngquist prepare such proposed order and present it to the Court on ten days' notice to all interested parties.

An exception is reserved to all aggrieved parties.

Dated this 12th day of January, 1953.

BY THE COURT:

GUNNAR H. NORDBYE

Chief Judge.